BOARD OF APPEALS CASE NO. 084/085	*	BEFORE THE
APPLICANT: Morning Brook LLC	*	ZONING HEARING EXAMINER
REQUEST: Rezone 30 acres & 122.2 acres from Agricultural to Rural Residential; intersection of MD Route 165 and Morse Road, Jarrettsville	*	OF HARFORD COUNTY
	*	Hearing Advertised
	*	Aegis: 4/8/98 & 4/15/98
HEARING DATE: June 1, 1998		Record: 4/10/98 & 4/17/98
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ZONING HEARING EXAMINER'S DECISION

Upon Motion by Counsel for Applicant, Case No. 084 and Case No. 085 were consolidated at the beginning of the hearing.

Case 084 seeks a rezoning of 30 acres from AG to RR. Case 085 seeks a rezoning of 122.2 acres from AG to RR.

The 084 parcel is located on the southeast side of MD Route 165 and Morse Road and is more particularly identified on Tax Map 39, Grid 1D, Parcel 208. The 085 parcel is also located on the southeast side of Rte. 165 and Morse Road and is more particularly identified on Tax Map 39, Grid 1D, Parcel 38. Both parcels (hereinafter, the "parcel") are presently zoned AG and are located within the Fourth Election District.

Mr. Anthony McClune appeared as Chief of Current Planning for the Harford County Department of Planning and Zoning. Mr. McClune stated that the Department took the position that the Applicant has the basis for a "mistake" argument supporting the rezoning request. In 1989, according to McClune, the parcel were designated on the 1988 Land Use Plan as part of the AG area. At that time, these parcels were not part of the Residential Infill area. In 1996, the Council adopted the 1996 Master Plan and the 1996 Land Use Element Plan. The Residential Infill area, as a result of the 1996 actions, now been extended to encompass the subject parcel.

Mr. McClune then read the department's position from the Staff Report prepared in this case, reciting, " In 1989, the County Council based its zoning decisions on the 1988 Land Use Plan which was the adopted County policy. The Council at that time could not have anticipated changes in the land use policy contained in the 1996 Land Use Element Plan. For these specific properties (Case No. 084 and No. 085), the Department agrees that this provides grounds for a mistake in the legal sense and for consideration of an individual zoning classification."

Mr. McClune also stated that the Planning Advisory Board had considered the Applicant's argument and agreed that a "mistake" in the legal sense had occurred in 1989 because the 1989 Council could not have been aware of the changes to the Master Plan made in 1996 (see May 26,1998 letter from Planning Advisory Board to Lee Hinderhofer, Chief Hearing Examiner). Mr. McClune also said that, in his opinion, that had this property requested rezoning to RR in 1989, and a Rural Residential area was shown as it is in the 1996 Plan, then the 1989 Council would have rezoned the property to RR. Mr. McClune concluded by stating that the Department considered RR an appropriate designation for the subject parcel, that the RR zone was consistent with the transportation element and that RR zoning would not have a significant impact to the school districts.

Next to testify was Denis Canavan, who qualified as an expert Land Use Planner. Mr. Canavan offered his opinion that a mistake was made in 1989, that that mistake is the basis for a piecemeal rezoning now and that RR is appropriate for the subject parcel. Mr. Canavan agreed that the 1989 Council could not have been aware of the changes made to the Master Land Use Plan in 1996. He also pointed out that the 1988 Land Use Plan designated a portion of the subject parcel as RR leaving the remainder as AG. In his opinion, this "split designation" is inconsistent with good zoning principles. The witness went on to describe the surrounding area and land use patterns describing them as a mix of agricultural, rural residential and forested areas.

The witness summed up the basis of his opinion that a mistake occurred in not rezoning this property to RR in 1989 by stating that (1) there was a clarification of the boundary of the Rural Residential Infill area, as it relates to the Applicant's property, during the revisions to the 1996 Land Use Plan. The 1989 County Council would not have known of this change during the 1989 Comprehensive rezoning.; (2) The Master Plan clarification was then followed with an individual property owner rezoning request during comprehensive rezoning in order to bring the property into conformity with the Master Plan. Such action would not have been contemplated in 1989.

A number of residents of the existing Morningbrook subdivision testified in favor of the rezoning request. These included Bonnie B. Denski, Amanda Mohr, Dawn Noyes, Denise M. Johnson and Gloria Radtke.

Jeff Baxter, Steven Hutchinson, Benson Sachs, Lynn Hutchinson, David Peper, Thomas Uzarowski, William Loeffler, Albert St. Clair, John Lewis, Thomas L. Clark and Steven Smith appeared in opposition to the Applicant's request to rezone the property. The substance of the testimony included concerns regarding transportation, road safety, adequacy of water supply, school capacity and other adequate facility concerns. None of the witnesses provided any substantive testimony refuting the Applicant's claim of "mistake".

CONCLUSION:

The Opponents, through the Office of People's Counsel first argue that the Application for rezoning before the Hearing Examiner is premature. These applications were filed on March 3, 1998 while the Comprehensive Rezoning, statutorily enacted by Harford County Bill No. 97-55 on October 1, 1997 was pending due to a successful petition for referendum of Bill 97-55.

In January, 1996, the Harford County Council voted to commence Comprehensive Rezoning Review pursuant to Code Section 267-13 et seq. and Article VII, Section 701 of the Harford County Charter. Thereafter, the Department of Planning and Zoning accepted applications for comprehensive rezoning from July, 1996 through October 15, 1996.

During November and December, 1996 the Department. As required by Code Section 267-13(B)(1), reviewed each application and solicited comments upon each application from other county departments and planning councils. In February, 1997, the Department of Planning and Zoning prepared its proposed revisions and recommendations to the Council. These recommendations were the subject of public meetings and further review during the spring of 1997. In May, 1997, the Department submitted its final recommendations to the Planning Advisory Board (PAB). After review by PAB, the County Executive submitted the proposed revisions and amendments to the Zoning Maps to the County Council who then entered into "the period of Council Review" as required by Code Sec. 267-13(D). In August, 1997 Council Bill 97-55 was introduced which proposed changes to the County Zoning Maps. On October 1, 1997 the Council passed Bill 97-55, thereby adopting the recommended changes and amendments to the zoning maps.

In November, 1997, 5,400 Harford County citizens took legislative action to Petition Bill 97-55 to referendum, thereby delaying adoption (or defeat) of the Bill and the changes to the zoning maps that t contemplates until November, 1998.

The gist of the opponent's argument is that the present Petition is barred by Section 267-13(E) of the Harford County Code which states:

> *"Notwithstanding any provisions of this Code, during the period of preparation and review of proposed comprehensive revisions or amendments to the Zoning Maps, no applications for zoning reclassification shall be accepted by the county, except as provided in Subsection C of this section, and such a request shall be considered in the preparation or modification of the proposed comprehensive revisions or amendments to the Zoning Maps."*

According to the Opponents, the "period of review" does not end with the enactment by the Council of Bill 97-55 but is extended until the voters of Harford County have an opportunity to cast their ballots in the November elections. Further, the Opponents argue that "...the Board's action on these zoning reclassification applications during the pendency of the referendum on Council Bill 97-55 would effectively eliminate county-wide citizen review of the council action in passing Council Bill 97-55, at least as that Bill relates to the Morning Brook properties. To allow these actions to proceed during the pendency of that referendum

proceeding would deprive the citizenry of its right to review and approve, or disapprove Council Bill 97-55."

The question then is whether the "period of review" contemplated by Section 267-13(E) has ended by Council vote on Bill 97-55 or whether the period of review is extended until the referendum vote takes place in November, 1998. If the period of review is extended, then the moratorium on acceptance of piecemeal rezoning applications would likewise be extended until that vote takes place. The opponents argue that allowing rezoning cases to be heard on a piecemeal basis would defeat the purpose of the referendum and deprive the voters of their right to approve or disapprove the actions of the County Council as set forth in Council Bill 97-55.

The Hearing Examiner disagrees with the position taken by the opponents. The Hearing Examiner is guided by the principals of statutory construction set forth by the Maryland Court of Special Appeals in Harford County, Md. V. McDonough, 74 Md. App. 119, 523 A2d 724 (1988), wherein the Court stated:

> " The cardinal rule of statutory interpretation is to ascertain and give effect to the intention of the legislative body which enacted the statute. The primary source to which we refer to determine legislative intention is the language of the statute itself. As this Court observed in Ford Motor Land Development v. Comptroller, 68 Md. App. 342, 346-47, 511 A.2d 578, cert.denied, 307 Md. 596, 516 A.2d 567 (1986):
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> > "Where the language [of the statute] is clear and free from doubt the Court has no power to evade it by forced and unreasonable construction". Thus, where there is no ambiguity or obscurity in the language of the statute, there is usually no need to look elsewhere to ascertain the intent of the General Assembly. Furthermore, the statute must be construed considering the context in which the words are used and viewing all pertinent parts, provisions and sections so as to assure a construction consistent with the entire statute. And, if there is no clear indication to the contrary, a statute must be read so that no part of it is rendered surplusage, superfluous, meaningless or nugatory. On the other hand, we shun construction of the statute which will lead to absurd consequences, or a proposed statutory interpretation if its consequences are inconsistent with common sense.
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> > Finally, we may not rewrite the statute by inserting or omitting words therein to make legislation express an intention not evidenced in its original form, or to create an ambiguity in the statute where none exists."

In the context of the comprehensive rezoning process, the "period of review" ended when the Council voted to pass Bill 97-55. No further review is necessary on the part of the Council, the Department of Planning and Zoning, the citizens advisory boards or any other county department that has thoroughly reviewed the various applications and made their recommendations. Whether ultimate adoption of Bill 97-55 is accomplished by referendum vote or whether the Bill is defeated is irrelevant in determining the "period of review" contemplated by the statute. This position is consistent with the moratorium provisions imposed by 267-13 which are designed to alleviate the burdens on the Department of Planning and Zoning and the County Council in reviewing piecemeal rezoning requests during the period of comprehensive review. It is equally clear, however, that there is one process or the other available to County property owners at all times. Either a property is the subject of comprehensive rezoning or is subject to piecemeal rezoning requests and nothing in the Code indicates a legislative intent to deny the right of any property owner to petition his or her property for rezoning for indefinite and undetermined periods of time.

Bill 95-85 was passed by the Council in January, 1996 and provided that , for a period of eighteen months from the date comprehensive rezoning commenced, no applications for rezoning would be accepted. Legislation to revise the Master Land Use Plan was introduced on May 7, 1996 and eighteen months from that date expired in November, 1997. If there were any further doubt as to the intent of the legislative body in this regard, it is laid to rest by examining subsequent acts of the Council directly related to the petition for referendum. On December 16, 1997, Councilwoman Hezelton introduced Bill 97-79 which purported to be an Emergency Act which would extend the moratorium on acceptance of rezoning applications originally instituted for an eighteen month period by Bill 95-85 until after the referendum vote in November. The Bill recites as reasons for its necessity nearly all of the arguments raised by the Opponents in this argument. Significantly, this Bill was defeated by vote of the County Council, which vote clearly expresses a legislative intent not to extend the period in which applications for rezoning will not be accepted.

It is also clear to the Hearing Examiner that the right of the voters to ultimately decide the outcome of Comprehensive Rezoning is not infringed by the acceptance of piecemeal rezoning applications which are significantly different then a county wide plan of rezoning that encompasses hundreds, if not thousands of properties within its purview. The basis for a piecemeal rezoning lies in the legal arguments of mistake or change in the character of the neighborhood and must stand or fall on the merits of each individual case, unlike a comprehensive plan which, by its nature, examines the entire County and ultimately reflects the zoning vision of the then current Council. Even if Council Bill 97-55 were defeated in November as it may be, nothing stands in the way of an individual property owner seeking rezoning of his or her property through appropriate means.

Based on the above, the Hearing Examiner concludes that the basis relied upon by the Opponents for dismissing the instant application as "premature" is without merit.

Having determined that the Application is properly before the Examiner, it must now be determined if the Applicant has met its burden of proof such that it is entitled to have the subject property rezoned.

In Maryland, a parcel of land may not be rezoned simply because the property owner wants the property rezoned or even if the zoning authority feels the property should be rezoned Before a property can be rezoned there must be strong evidence of mistake in the zoning classification or a change in the character of the neighborhood since the last comprehensive rezoning. These principles and their corollaries were summarized by the Maryland Court of Appeals in Boyce v. Sembly, 25 Md. 43, 344 A.2d 137 (1975). The Court set forth the change-mistake rule which may be summarized as follows:

1. The zoning classification assigned to a parcel of land is presumed to be correct.

2. A piecemeal zoning classification of a parcel of land cannot be granted unless and until the presumption of correctness is overcome.

3. The presumption of correctness can only be overcome by strong evidence that there was a mistake in the comprehensive zoning or there has been a change in the character of the neighborhood of the subject property since the last comprehensive zoning which justifies the piecemeal zoning classification.

4. Once a change in the character of the neighborhood or a mistake in the last comprehensive zoning is established, rezoning is permissible but not mandated.

5. However, once an applicant establishes the requisite change in the character of the neighborhood or a mistake in the comprehensive zoning, the denial of the requested reclassification must be sufficiently related to the public health, safety or welfare to be upheld as a valid exercise of the police power. Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972). In the case of a denial where the applicant has met his burden of establishing a change in the character of the neighborhood or a mistake in the comprehensive zoning, the zoning authority must find facts, upon the evidence, which would support a denial. Messenger v. Board of County Commissioners for Prince George's County, 259 Md. 693, 271 A.2d 166 (1970), The factual determination of the zoning authority must be supported by substantial, competent and material evidence contained in the record. Not every potential problem will serve to validate a decision to deny a requested rezoning; the problems must be real and immediate, not future and imaginary. Furnace Branch Land Company v. Board of County Commissioners, 232 Md. 536, 194 A.2d 640 (1963).

As stated by the Maryland Court of Special Appeals, the presumption of the validity of comprehensive rezoning,

> "...is overcome and error or mistake is established when there is probative evidence to show that the assumptions of premises relied upon by the Council at the time of comprehensive rezoning were invalid. Error can be established by showing that at the time of comprehensive rezoning the Council failed to take into account then existing facts or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. Error or mistake may also be established by showing that events occurring subsequent to rezoning have proven that the Council's initial premises were incorrect...It is necessary not only to show facts that exist at the time of comprehensive rezoning but also which, if any, of those facts were not actually considered by the Council...Thus, unless there is appropriate evidence to show that there were then existing facts which the Council, in fact, failed to take into account or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive rezoning is not overcome, and the question of error is not "fairly debatable". Joyce v. Smelly, supra; Rockville v. Stone, 27 Md. 655, 319 A.2d 536 (1974) (emphasis added).

Thus, the Maryland Courts have laid out a two-pronged test. First, has a change in the character of the neighborhood or a mistake been established that would permit the rezoning of the property. Second is whether the property should be rezoned.

The Applicant argues that the 1989 Council could not have known that the 1996 Council would change the designation of the property from AG to Rural Residential Infill on the 1996 Master Land Use Plan. Further, the Applicant concludes that if the 1989 Council had been presented with a zoning map like the 1996 one, it would have rezoned the subject parcel at that time. The Applicant makes an additional point that the 1989 map showed a small portion of the subject parcel as Rural Residential Infill while the majority of the parcel was Agriculturally classified, thus the 1989 Council was mistaken in allowing a "split-classification" of a single parcel contrary to good planning and zoning practices.

It is important to note that the property was not "split-zoned" in 1989, it merely was shown with two classifications on the 1988 maps. The entire parcel was, in 1989, zoned entirely Agricultural. In any event, the Council had before it the 1988 Plan and knew that the split classification existed in 1988 and took no action in 1989 to correct what the Applicant characterizes as "poor planning practice". However, to establish mistake such that a rezoning can be accomplished on a piecemeal basis, it is necessary to show that the Council did not take into account then existing facts. No evidence was adduced indicating that the Council was unaware of the split-classification of this parcel.

Secondly, the Master Plan is a dynamic instrument which, by its very nature, is subject to constant review, modification and overall change. It serves as a guide in matters of zoning but is not intended to be a static document. It seems difficult to believe that a sitting Council in the throes of a comprehensive rezoning process would not consider that the Master Land Use Plan would again change in the future. It seems more tenable that any Council would anticipate and expect changes to the Plan in the future as the needs of the County change over time.

The Maryland Court of Appeals has said that, "...a master plan is only a guide and is not to be confused with a comprehensive zoning, zoning map or zoning classification (cites omitted). It is a mistake in the latter, not in the master plan, which may support a rezoning." Patey v. Board of County Commissioners for Worchester County, 271 Md. 352, 317 A.2d 142 (1974). "The Plan does not, in itself, establish either a mistake in original zoning or a change in conditions changing the character of the neighborhood and does not, in itself, justify a rezoning." Montgomery v. Board of Commissioners for Prince George's County, 256 Md. 597, 261 A.2d 447 (1970).

The Hearing Examiner cannot conclude, based on the evidence presented, that a mistake occurred in 1989 when the County Council did not rezone the subject parcel from AG to RR. The change in the Master Plan in 1996 is, in the opinion of the Hearing Examiner, a change that is general in nature and not specific to the subject parcel. It is also one that could have been reasonably contemplated by the Council in 1989. A mistake alleged to have occurred must relate to the specific property for which a rezoning is sought, and may not consist of generalities. Patey v. Board of County Commissioners for Worchester County, supra.

For the reasons set forth herein, the Hearing Examiner recommends that the subject applications be denied.

Date August 13, 1998

William F. Casey
Zoning Hearing Examiner